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No. _____

In the Supreme Court of the United States

October Term, 1986

JEROME B. ROSENTHAL,

Petitioner,

v.

HERBERT HAFIF, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Whether a state court which compels a civil litigant to accept the results of an arbitration which was conducted in fundamental violation of terms to which he agreed, thereby denies to the litigant the right of access to the courts in violation of the Fourteenth Amendment.

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JEROME B. ROSENTHAL,

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HERBERT HAFIF, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioner, Jerome B. Rosenthal, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division One, entered in this proceeding on July 7, 1986. The California Supreme Court denied petitioner's Petition for Review on September 24, 1986.

OPINIONS BELOW

The opinion of the California Court of Appeal is attached hereto as Appendix A. A copy of the California Supreme Court order denying the Petition for Review is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, Division One, was entered on July 7, 1986, affirming judgment in the Los Angeles Superior Court against petitioners dated December 18, 1984. Thereafter, the California Supreme Court, on September 24, 1986, denied a Petition for Hearing. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, section 1: [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from an arbitration carried out in violation of the arbitration agreement of the parties, and of the rules governing the arbitration process chosen by them.

Respondent Hafif represented petitioner Rosenthal in the last phases of a legal malpractice action arising out of the case of Rosenthal, et al. v. Day, et al., which came before this court as No. 85-1205, cert. denied. A $26 million judgment was rendered against Rosenthal in that action. Rosenthal in turn sued his insurers for bad faith in their representation of him, and the attorneys hired by the insurers to represent him for malpractice. He was represented by Hafif in the actions against the insurers and the attorneys they hired to represent him, and recovered $995,000 against them, for which Hafif received a one-third contingency fee (Appendix A, pp. A2-A3).

Rosenthal represented himself through most of the malpractice action, but associated Hafif in during its

last stage, which resulted in a settlement. Under the settlement, entered into shorly before the trial date and the expiration of the statutory time limit, Rosenthal received a cash payment of $205,000 and an annuity of $50,000 a year. It is undisputed that Hafif offered to waive his fee in order to overcome Rosenthal's reluctance to accept this settlement (Appendix A, pp. A2-A3).

Hafif subsequently filed an action in Los Angeles Superior Court, claiming that Rosenthal had not paid him the fee due to him for settling the malpractice action. Rosenthal requested the dispute be arbitrated under California Business and Professions Code section 6200 et seq., and both parties agreed to binding arbitration under the auspices of the Los Angeles County Bar Association pursuant to this statutory scheme (Appendix A, p. 3).

Rosenthal's position was that he had agreed to accept the settlement only under the extreme time pressure, and on the understanding that Hafif's offer to waive his fee still stood when accepted it (CT 259-61, 63). Hafif did not deny that he had offered to waive his fee, but he contended that he did so only on condition that Rosenthal accept the settlement on the day it was offered, and that it had therefore expired when Rosenthal agreed to the settlement several days later (CT 80-81, 259-61, 263).

At the outset of the arbitration, the parties and the arbitrators agreed that the proceeding would be bifurcated. The arbitrators would first hear evidence and argument only on the question of whether any fee at all was due from Rosenthal to Hafif. Only if they found in the affirmative on this question would they then go on to hear evidence as to the amount due, and go on

to decide that question (CT 258). In pursuance of this agreement, the arbitrators admonished Rosenthal not to present evidence with regard to the amount of fees due Hafif during the first phase of the proceedings, and he complied (CT 39, 40).

Having completed the first phase of the proceeding, the arbitrators issued an intended ruling covering *both* phases of the proceeding. This ruling settled the second issue by the admittedly "arbitrary" (CT 467) division of the $205,000 cash payment, $155,000 to Hafif and $50,000 to Rosenthal. The ruling allowed for an "argument only" hearing at the request of either party, for further consideration of the "second phase" issues, but precluded the submission of any further evidence (CT 265). Rosenthal objected to the arbitrators' failure to conduct the agreed-upon second phase, but did request the additional "argument only" hearing offered by the arbitrators (CT 332-33).

Only two of the arbitrators were present at that hearing when it was held, and they explained that the third arbitrator, who had participated in all previous hearings, had "disappeared", and had not participated in the deliberations leading to the intended decision. The remaining two arbitrators announced that they would continue in his absence (CT 468). The rules under which the arbitration was being conducted provided that two arbitrators could proceed in the absence of the third "only with the express consent of the parties" (Rule 19, Los Angeles County Bar Association, Arbitration Committee, Rules for Conduct of Arbitration of Fee Disputes and Other Related Matters). No such consent was sought or given.

After that hearing, an arbitration award signed by only one of the arbitrators was handed down. That award

departed from the intended decision only in reallocating $5,000 from Hafif to Rosenthal (CT 432-34).

California Code of Civil Procedure section 1284.2, under which the arbitration was carried out, allows for no judicial review of arbitral awards on the merits. Awards may be vacated only if:

> (a) The award is procured by corruption, fraud or other undue means;
>
> (b) There was corruption in any of the arbitrators;
>
> (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;
>
> (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted;
>
> (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

In response to Rosenthal's petition to vacate the award because of irregularities in the proceedings, and Hafif's petition to have it confirmed, the Los Angeles County Superior Court confirmed the award (Appendix A, p. A4). This decision was affirmed on appeal by the Court of Appeal for the Second Appellate District, Division One, on July 7, 1986 (Appendix A). On September 24, 1986, the Supreme Court of California denied Petitioners' petition for review (Appendix B).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES THE QUESTION, NEVER DECIDED BY THIS COURT, WHETHER A STATE DENIES A PERSON ACCESS TO THE COURTS, AND THEREBY DEPRIVES HIM OF PROPERTY WITHOUT DUE PROCESS OF LAW, WHEN IT COMPELS HIM TO ACCEPT AS A FINAL DECISION ON THE MERITS, THE RESULT OF AN ARBITRATION WHICH WAS CONDUCTED IN A MANNER FUNDAMENTALLY VIOLATIVE OF THE ARBITRATION AGREEMENT OF THE PARTIES.

A. This Court Has Recognized A Constitutional Right Of Access To The Court Founded On A Number Of Specific Provisions Of The Bill Of Rights.

This Court has articulated a "right of access to the courts" founded in the First Amendment right to petition the government for redress of grievances, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the due process clause, *Bounds v. Smith*, 430 U.S. 817 at 821 (1977), and the privileges and immunities clauses of Article Four and the Fourteenth Amendment. *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142.

In *Chambers* this court described the right of access in these terms:

> In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of highest and most essential privileges of citizenship.
> 207 U.S. at 148.

As a consequence of the proceedings outlined above, Rosenthal has been denied effective access to the courts for his grievance, in violation of these constitutional rights.

B. An Award Arrived At As The Result Of Arbitration By Agreement Of The Parties Can Be Binding Only Where The Arbitrators Have Acted Within The Authority Granted Them By The Agreement.

One who agrees to arbitration cannot complain of denial of access to the courts after arbitration, *provided* the arbitrators have acted within the scope of their authority. But an arbitral award cannot be upheld where the arbitrators have exceeded the authority granted to them by the agreement of the parties. *Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union*, 345 F.2d 757, 760 (9th Cir.1965). As this Court has held in the labor arbitration context, the arbitrator "does not sit to dispense his own brand of industrial justice". His award "is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America*, 363 U.S. 593 at 597 (1960).

So here, the arbitrators' award can be binding only to the extent that the arbitrators acted within the limits of the agreement of the parties, and of the rules governing the arbitration system to which they chose to submit their case.

The arbitrators in this case departed from that agreement and those rules in a number of respects. The most egregious departures involve (1) the failure of the arbitrators to hold the second part of the bifurcated proceeding agreed upon by the parties, and (2) their failure to seek the consent of the parties to proceed to

decision with only two of their number, rather than the three who were supposed to make the decision. In upholding the award of the arbitrators in spite of these fundamental breaches of the parties' rights to control the course of proceedings, the courts of California have deprived Rosenthal of his access to them on the merits of his cause, and therefore deprived him of his property without due process of law. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, *supra; Bounds v. Smith*, 430 U.S. 817 at 821, *supra.*

1. The Parties and the Arbitrators Agreed to the Bifurcation of the Hearing and Rosenthal Limited His Presentation of Evidence in the First Phase in Reliance on It.

It was recited in the arbitrators' final award that all concerned had agreed to a bifurcated proceeding, in which the amount of liability, if any, would not be determined until the second phase (CT 258). It is also on the record of the intended "first phase" (which turned out to be the only phase) that Rosenthal was admonished not to present evidence on the amount of his potential liability for fees, and refrained from doing so (CT 39-40). There can be no doubt, therefore that the arbitrators, in presenting their intended decision on *both* phases of the case after hearing only one, and denying Rosenthal the opportunity to present the evidence he had reserved, were dispensing their own "brand" of justice, not that agreed to by the parties. *United Steelworkers of America*, 363 U.S. 593 at 597, *supra.* This was a fundamental breach of the understandings of the parties which denied to Rosenthal the fundamental right to present evidence on every aspect of the case before decision.

2. The Decision of the Remaining Two Arbitrators to Go Forward on Their Own, without the Consent of the Parties, Was a Fundamental Breach of the Rules By Which the Parties Agreed to Arbitrate.

So too, in going forward with only two arbitrators, without the consent of the parties (CT 468), the arbitrators were disregarding a crucial requirement of the rules of the system under which the parties agreed to arbitrate.

The absence of the third arbitrator from the process of decision-making was a significant departure from the rules, although decision was by majority vote. As California courts have held, provision for decision by three arbitrators is intended to offer a particular quality of collective decision-making:

> The arbitrators are not isolated from each other; they hear and decide the case as a panel after joint discussion, debate, and deliberation. Each panel member has an opportunity to persuade the others.
> *Wheeler v. St. Joseph Hospital,* 63 Cal.App.3d 345 at 372.

Further, the requirement of express consent of the parties to proceed with two arbitrators had as its purpose the very goal of reinforcing the parties' control over the proceedings: it ensured that the basic character of these proceedings would not be altered without the parties' concurrence (Rule 19, Los Angeles County Bar Association, Arbitration Committee, Rules for Conduct of Arbitration of Fee Disputes and Other Related Matters).

C. Because Rosenthal Has Been Denied An Adjudication On The Merits Of His Grievance Either In The Arbitration Process To Which He Agreed Or In The Court's, He Has Been Deprived Of His Constitutional Right Of Access To The Courts.

Because the arbitrators made fundamental departures from the process agreed upon by the parties to govern their deliberations, Rosenthal was effectively denied benefit of the adjudication to which he had agreed. Because he was, in spite of these departures, forced to comply with the award arrived at through this process, and precluded from adjudication on the merits of Hafif's claim against him in a lawful tribunal, he was effectively denied access to the courts, and the judgment against him was thus a deprivation of property without due process of law. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, *supra; Bounds v. Smith,* 430 U.S. 817, *supra.*

Lower Federal courts have heretofore considered and denied claims that arbitration requirements under Federal statutes unconstitutionally deny access to the courts. *Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1124 (Cir.1984); *Shelter Framing Corp. v. Carpenters Pension Fund*, 543 F.Supp. 1234 (1982). Central to these decisions, however, is the fact that the statutory scheme on which they passed do not preclude resort to the courts *on the merits*, after arbitration. Both courts emphasized the fact that the losing party in these arbitrations "may go to court after arbitration, albeit with a presumption of correctness in the arbitrators findings of fact . . . ." *Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1124 at 1133, *supra.* In the view of the *Shelter Framing Corp.* court, 543 F.Supp. 1234 at 1245, *supra*, it is this "eventual court review" on the merits (though subject to the presumption that

the arbitrators' findings of fact are correct unless "clearly erroneous"), which saves the system's constitutional validity.

Under the California arbitration scheme at stake here, however, there is no such an opportunity for review on the merits. As has been seen, that scheme allows for the vacation of arbitral awards misconduct or *ultra vires* action on the part of the arbitrators. Civil Procedure Code section 1286.2. California courts have made it clear that

> The merits of the controversy are for the arbitrator, not for the courts; it is not appropriate for a court to review the sufficiency of the evidence before the arbitrator or to pass upon the validity of the arbitrator's reasoning. *Ray Wilson Co. v. Anaheim Memorial Hospital Assn.*, 166 Cal.App.3d 1081 at 1091 (1985).

Such a system of binding arbitration is unobjectionable when agreed upon by the parties. By agreement, the parties waive the right of access to the courts. In a case such as the instant one, however, the waiver of the right to access is vitiated by the arbitrators' gross violations of the agreement. Under these circumstances, if the party has no opportunity to take the merits of his case to court, he is being denied the benefits *both* of an arbitration process to which he has agreed, *and* of judicial determination. The result is an unconstitutional denial of access to the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, *supra; Bounds v. Smith*, 430 U.S. 817, *supra.*

Thus, this Court should make it clear that where a state precludes access to the courts on the merits by making the merits of arbitral awards unreviewable,

actions by arbitrators in violation of the agreements under which they operate raise questions of Federal Constitutional rights, questions ultimately to be decided under standards established by this Court.

D. By Granting Review Here, This Court Can Help To Ensure The Integrity Of The Arbitration System, And Enhance Its Attractiveness To Litigants As An Alternative To Resort To The Overcrowded Court System.

It is essential to the future well-being of our judicial system that consensual arbitration be made an attractive alternative to litigation. In the words of former Chief Justice Burger:

> In the public interest, we must move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration, mediation, and conciliation.
> *1985-1986 Annual Report of the American Arbitration Association*, p. 1 (1986).

If this need to develop and encourage the use of various means for "diverting" cases away from our overcrowded courts is to be met, people need to be given the assurance that an agreement to arbitrate cannot be turned into a trap. This Court must therefore make it clear that it will protect the fundamental right of access to the Courts by rejecting as unconstitutional any effort to make the fruits of an arbitration process final on the merits though it violates the terms on which arbitration was agreed to.

To this end, this Court has held with regard to *federally* authorized arbitration that

> Congress has put its blessing on private dispute settlement arrangements . . ., but it was

> anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity.
> *Hines v. Anchor Motor Freight,* 424 U.S. 554, 571 (1976).

It is now time to ensure that state systems of binding arbitration also operate with the "minimum levels of integrity" required by due process, and thereby ensure that the courts are barred *only* to those who have agreed to an alternative, *and* had the benefits of the process to which they agreed.

The California Court of Appeal in the instant case did not deny that the arbitrators departed from their authorized course in the ways described. Instead, it found in each case that Rosenthal had failed to carry his burden of showing prejudice had accrued from these departures (Appendix A, pp. A6, A9-A10).

What the Court of Appeal failed to see, however, was that prejudice was inherent in the arbitrators' fundamental reshaping of the process: in their failure to have a second phase in the proceeding, after assuring Rosenthal that he would have an opportunity to present evidence at that phase (CT 39-40), and in their denial to him of the advantages of the joint deliberations of three arbitrators, the decision process to which he had given his consent.

To impose the additional burden, nearly impossible to meet, of showing further specific prejudice, is to tell those who would opt for arbitration that they cannot count on getting the system for which they bargained. By reviewing the Court of Appeal decision and establishing affirmatively that states cannot in this manner compel people to accept an arbitral award arrived at by means they have not authorized, this Court

will give the constitutional right of access to the courts the protection it deserves, and at the same time enhance the integrity of the arbitration process. With this Court as ultimate guarantor of that integrity, giving individuals the assurance that they cannot be trapped into accepting a process to which they did not agree, arbitration can flourish as a genuinely consensual and constitutional alternative to access to the courts of the state and nation.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

COURT OF APPEAL-SECOND DIST.
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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

HERBERT HAFIF et al.,	)	B008880
Plaintiffs and Respondents,	)	(LASC No. EAC 37639
	)	C500612)
v.	)	
JEROME B. ROSENTHAL,	)	
Defendant and Appellant.	)	
	)	

APPEAL from a judgment of Los Angeles County Superior Court, Arthur Baldonado, Judge. Affirmed.

Jerome B. Rosenthal and Edward J. Horowitz for Defendant and Appellant.

Herbert Hafif and Gary E. Cripe for Plaintiffs and Respondents.

APPENDIX A

Jerome B. Rosenthal appeals from judgment entered on order confirming arbitration award in an attorney fee dispute brought by Herbert Hafif.

I

FACTS

This appeal involves Hafif's claim for attorney fees for representing Rosenthal during the final months of a legal malpractice action in which Rosenthal was plaintiff. The malpractice action had its origin in a previous case involving Doris Day and others in which Rosenthal was plaintiff and cross-defendant; a $26 million judgment was rendered in that action against Rosenthal, and he sued his insurance companies for the bad faith manner in which they provided him with a defense on the cross-complaints. Hafif represented Rosenthal in these bad faith actions against the insurance companies, which were ultimately settled for $955,000.

Rosenthal also sued some of the attorneys hired by the insurance companies to represent him in the Day litigation. He represented himself in this legal malpractice action for several years before Hafif became attorney of record in association with Rosenthal in October 1980. The case was settled in August 1981, shortly before its scheduled trial date and expiration of the five-year statute. The settlement provided for cash payment to Rosenthal of $205,000, and an annuity payable to him in the amount of $50,000 per year for life; the present value of the entire settlement was estimated to be approximately $500,000.

Hafif filed an action against Rosenthal in the East District of Los Angeles Superior Court seeking his attorney fees for representation in the malpractice case. Rosenthal requested arbitration pursuant to Business

and Professions Code section 6200 et seq., and both parties agreed that the arbitration would be binding. Rosenthal asserted in his petition for arbitration that he had been coerced by Hafif into accepting the settlement by Hafif's refusal to otherwise try the case, and that his acceptance was in reliance upon Hafif's promise to waive his fee. In response, Hafif asserted that the offer to waive his fee was expressly conditioned upon Rosenthal's acceptance of the settlement offer at the time it was made in Judge Galceran's chambers, and as Rosenthal did not accept it at that time, the offer to waive his fee lapsed and the original contingency fee arrangement remained in effect.

Hearings began before three arbitrators pursuant to the Los Angeles County Bar Association arbitration rules. At the outset of the hearings, the arbitrators bifurcated the proceedings, seeking to determine in phase one whether Hafif was entitled to any fees despite the alleged fee waiver, and if so ascertaining the amount of the fee in phase two. Eighteen arbitration sessions were held between March 1982 and September 1983. The parties submitted additional written briefs and declarations, and an intended decision was issued in April 1984. The arbitrators found that the fee waiver had been conditional, the condition had not been met, that Hafif was entitled to a fee of $150,000 plus interest and $5,000 in costs, and that Rosenthal was entitled to $50,000 plus interest for his services in the case. The arbitrators noted that although they had initially planned to decide phase two separately, they felt they had already heard enough overlapping evidence to measure the dollar amounts for the services rendered. The parties were given the opportunity to request a further hearing for argument regarding the monetary valuation; that hearing was requested and scheduled for June 18, 1984.

On June 4, 1984, Rosenthal filed a petition in the Central District to vacate the arbitration award based on various irregularities in the proceedings. Hafif moved to dismiss the petition as premature as there was not yet a final arbitration award. Meanwhile, the requested monetary evaluation hearing was had before two of the arbitrators on June 18. Hafif stipulated that he had already received his $5,000 in costs, and that Rosenthal was entitled to that $5,000. In a final award dated July 6, 1984, the arbitrators modified their intended decision to reflect that change, and otherwise made their intended decision their final decision.

Hearing on Rosenthal's Central District petition to vacate was continued first to July, then to September. Hafif filed petition to confirm the arbitration award in the East District on August 28, 1984. The East District trial court took jurisdiction of Hafif's petition to confirm, over the objection of Rosenthal. The Central District court, on its own motion, ordered Rosenthal's petition to vacate transferred to the East District and consolidated with Hafif's petition to confirm for all purposes. After hearing, the trial court granted Hafif's petition to confirm the award, denied Rosenthal's petition to vacate the award, and entered judgment from which this appeal is taken.

II

GROUNDS FOR VACATION OF AWARD

Code of Civil Procedure section 1286.2 sets forth the grounds for vacation of an arbitration award: "[T]he court shall vacate the award if the court determines that: (a) The award was procured by corruption, fraud or other undue means; (b) There was corruption in any of the arbitrators; (c) The rights of such party were substantially prejudiced by misconduct of a neutral

arbitrator; (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title." Appellant asserts various irregularities in the arbitration proceedings, couched in these terms, that require that the award be vacated.

III

REFUSAL TO CONDUCT SECOND PHASE OF PROCEEDINGS

The first claimed irregularity is the arbitrators' refusal to conduct the second phase of the bifurcated proceeding. At the outset of these proceedings it was decided that the arbitration would be bifurcated. In phase one, the arbitrators would determine whether appellant owed respondent any legal fees because of a statement by respondent purporting to waive all fees if appellant accepted a settlement offer. If the arbitrators found in the affirmative as to that question, in phase two they would determine what amount was payable. After 18 arbitration sessions regarding phase one, the arbitrators issued an intended decision. They found that respondent had been engaged as appellants' attorney, that respondent had subsequently waived his fee, and that the fee waiver was upon a clear condition that was not met, thereby restoring the parties to the original attorney-client relationship with expectation of a fee. They explained that even though the matter had been bifurcated, such an enormous amount of overlapping

evidence was received that they felt that at that point they could adequately measure the dollar services, and thus determined that the total fee was $200,000 (40% of present cash value of the settlement), and allocated three-fourths of it to Hafif and one-fourth of it to Rosenthal. The parties had the opportunity to present argument regarding both the amount and allocation of the monetary valuation, and did so at hearing.

Appellant argues that by this action of the arbitrators, he was unable to present evidence regarding the valuation of services. While refusal of arbitrators to hear material evidence is a ground for vacation of an arbitration award (Code Civ. Proc., § 1286.2, subd. (e)), it is only so where such refusal substantially prejudices the rights of the party seeking vacation. (*Canadian Indem. Co. v. Ohm* (1969) 271 Cal.App.2d 703, 708-709.) Appellant made no offer of proof as to what evidence he was prevented from presenting; he failed to make any showing of what facts he or his witnesses could have established by their testimony. Although he repeatedly stated that he had refrained from presenting any phase-two evidence, he made no showing as to what competent and material evidence he would have presented. In the absence of such showing, either during that final arbitration session or in the trial court, appellant failed to sustain his burden of establishing prejudice from the arbitrators' refusal to conduct the evidentiary hearing on phase two so as to require vacation of the award. (*Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 510; *Canadian Indem. Co. v. Ohm, supra*, 271 Cal.App.2d 703, 709; *Moore v. Griffith* (1942) 51 Cal.App.2d 386, 389.)

In support of his claim, appellant cites us to his statements during that final hearing on monetary valuation where he argues that there is insufficient

evidence to support the arbitrators' numerical computation allocating the fees three-fourths to respondent and one-fourth to him. The excerpts from the transcripts of the first 18 arbitration hearings provided to the trial court do not support his claim of no evidence upon which the arbitrators could base their allocation. More importantly, as appellant concedes, we are not to review the sufficiency of the evidence before the arbitrators or pass upon the validity of their reasoning; the merits of the controversy were for the arbitrators, not for the courts. (*Ray Wilson Co. v. Anaheim Memorial Hospital Assn.* (1985) 166 Cal.App.3d 1081, 1091.) After 18 hearings and receipt of documentary evidence, the arbitrators expressly stated they had enough evidence upon which to base their valuation of respondent's services, and we may properly inquire no farther into that determination.

There is no merit to appellant's contention that since the arbitrators admitted their allocation was "arbitrary" the award must be vacated. At the opening of the final arbitration hearing, one of the arbitrators did state that they had prepared and submitted "an arbitrary finding of fact and an intended award." But the use of the word "arbitrary" in that context cannot reasonably be construed to mean capricious or whimsical, especially in light of the large number of hearings and the detailed, nine-page intended decision. Far more consistent with the context of the arbitrator's statement is the first definition of the word "arbitrary" found in Webster's Third New International Dictionary (1981) page 110: "depending on choice or discretion; *specif*: determinable by decision of a judge or tribunal rather than defined by statute."

We also find no merit in appellant's contention that the arbitrator's decision as to fee allocation before it

was submitted to them was an act in excess of their powers. Appellant's motion to bifurcate had been granted by the arbitrators "in an effort to move these proceedings in a timely fashion." The purpose of the bifurcation had been efficiency, not added formality. The submission of questions to them was not formally circumscribed by their attempt at efficiency.

Respondent's entitlement to a fee from appellant was the central issue in the arbitration proceeding; appellant's assertion in his petition for arbitration that he himself had provided the bulk of the legal services in the case presented the arbitrators with the issue of fee allocation between the two attorneys. Their determination of this submitted issue was not in excess of their powers, even in the absence of formal "phase two" hearings.

IV

FAILURE OF THIRD ARBITRATOR TO PARTICIPATE

Although the first 18 evidentiary hearings of this arbitration were conducted in the presence of three arbitrators, one of the arbitrators, for unknown reasons, ceased participation in the proceedings at the conclusion of the 18th session, and did not confer with the other two in the draft of the intended decision and did not attend that very last hearing regarding monetary valuation. The remaining arbitrators followed rule 30 of the Los Angeles County Bar Association rules for fee dispute arbitration which permits the remaining arbitrators to continue in the absence of a duly notified member of the panel who fails to participate. However, this arbitration was commenced prior to August 15, 1983, and the arbitrators should have followed former rule 19 then in effect, which permits the remaining two arbitrators to proceed with the arbitration at their

option, "but only with the express consent of the parties." The record reveals no express consent by appellant to proceed without the third arbitrator. Appellant claims the award should be vacated for this irregularity.

Arbitration awards rendered by only two members of a three-member panel have been upheld where all members had been present at the evidentiary hearings, and the concurrence of only two members is necessary for an award; the absent arbitrator has been held to represent nothing more than a dissent. In the absence of some showing of prejudice from the absence of the third arbitrator and his failure to participate in the award, this irregularity does not require vacation of the award. (*Turner v. Cox* (1961) 196 Cal.App.2d 596, 600-602; see also *Davey Tree Surgery Co. v. International Brotherhood of Electrical Workers* (1976) 65 Cal.App.3d 440, 447-450.)

The Los Angeles County Bar Association rules provide: "The award of the three-person panel, rulings on the admission of evidence and other such matters not otherwise specified herein shall be made by concurrence of two or more of its members." (Rule 22.) All three members were present at the 18 sessions at which evidence was taken; the final session, which the third member did not attend, was for the purpose of argument only. The intended decision was sent to him with a request that he forward any comments to the other panel members. His failure to participate can be considered nothing more than a dissent to the concurrence of the other two members. Even where a protested irregularity involves violation of an applicable statute, or in this case, an arbitration rule, a party must show substantial prejudice from that irregularity. (*United Brotherhood of Carpenters etc., Local 642 v.*

De Mello (1972) 22 Cal.App.3d 838, 840.) Here appellant has shown none.

Wheeler v. St. Joseph Hospital (1976) 63 Cal.App.3d 345, 370-372, upon which appellant relies, is inapplicable. That case involved the possible bias of one of the arbitrators. There the court rejected the argument that the award should be upheld because even excluding the disqualified arbitrator, there was a majority in favor of the award; the court was understandably concerned with the potential for persuasion by that panel member, especially as he was a medical member on a panel with lay persons deciding a medical malpractice claim, thereby representing a significant influence on the ultimate majority decision. In contrast, our case involves the absence of any influence by one panel member equally situated with the other two, rather than a potentially biased influence by an expert. The *Wheeler* concerns are simply not present in our case. The failure of the third arbitrator to participate in the award does not require that the award be vacated.

V

FAILURE TO DECIDE SUBMITTED ISSUE

Appellant next contends the arbitrators failed to determine what legal services respondent rendered for appellant in the lawsuit. Business and Professions Code section 6203, subdivision (a), like Code of Civil Procedure section 1283.4, provides that an arbitration award "shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." "The determination of which issues are actually necessary to the ultimate decision is a question of fact to be resolved by the arbitrator." (*United Food & Commercial Workers*

Union v. Clougherty Packing Co. (1984) 154 Cal.App.3d 282, 288.)

Here the arbitrators found "that the respondent performed services of such a nature that a fee is justified," that respondent and appellant "were in effect co-counsel," that respondent is entitled to a fee of $150,000, and that appellant is entitled to $50,000 for his services in the case. Implicitly, they evaluated the extent of services rendered by each of the parties in order to reach their determination as to the entitlement to fees. The arbitrators were not required to explain their award or provide reasons for their conclusions. (*Arco Alaska, Inc. v. Superior Court* (1985) 168 Cal.App.3d 139, 148.) "An award is valid if it settles the entire controversy and there is no general rule that an arbitrator must either find facts [citations], detail the process by which the result was reached [citation] or give the reasons behind the award. [Citation.] It is not the finding on issues that is required; it is the determination thereof when 'necessary in order to determine the controversy.' " (*Cothron v. Interinsurance Exchange* (1980) 103 Cal.App.3d 853, 860.) The arbitrators here decided the issues necessary to determine the controversy, and any failure to expressly find on other issues is not a basis for vacating the award.

VI

UNPROFESSIONAL CONDUCT

Appellant contends respondent's claim for fees should be dismissed or denied in its entirety because of his unprofessional conduct while representing appellant and during the litigation that followed. The alleged misconduct while representing appellant was in placing appellant in the position of having to accept the settlement offer or proceeding to trial without time to

obtain new counsel. This is the same allegation raised by appellant in his petition to arbitrate. Evidence was presented by both parties on this question, bearing on whether respondent had ever agreed to try the case, the feasibility of trying the case, and the adequacy of the settlement under the circumstances. The arbitrators concluded after review of all the factual situations "that the services of Mr. Hafif were of that value that the annuity which is payable to the petitioner resulted therefrom, and in light of the problems with the underlying case, the petitioner was well served by the respondent." To reevaluate that determination of respondent's professional conduct during the lawsuit would be an impermissible venture into the merits of the controversy, which is the domain of the arbitrators, not the courts. (*Ray Wilson Co. v. Anaheim Memorial Hospital Assn. supra*, 166 Cal.App.3d 1081, 1091.)

We may, of course, examine appellant's claims of misconduct by respondent during the arbitration proceeding itself. Our review, however, reveals nothing more than extremely aggressive argument by respondent and on his behalf during a hard-fought adversary proceeding. This was not a trial to a jury of laymen, unable to distinguish between evidence and argument; it was an arbitration proceeding before attorneys. The arbitrators expressly recognized the "verbosity, pomposity, braggadocio, and all the extraneous, irrelevant issues" raised in the proceedings, and managed to wade through it all to reach a determination on the relevant issues. While we do not condone the manner in which respondent's case was presented, we do not find the conduct to be so reprehensible as to render the arbitration award invalid.

VII

JURISDICTION IN THE EAST DISTRICT

Appellant has objected at all times to the jurisdiction of the East District over the confirmation proceedings. This claim is without substance. The substitution of attorney form prepared by appellant and signed by appellant and respondent shows respondent's office address to be in Claremont, California, thereby recognizing that the legal services would be performed in Claremont, which is in the East District. Under rule 300 of the Rules of Superior Court for Los Angeles County, this contract action was properly filed in the East District since there is express recognition that the contract would be performed in that district. We also note the absence of any showing of prejudice to appellant from the confirmation proceedings being heard in the East District.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUCAS, J.

We concur:

HANSON (Thaxton), Acting P.J.

DEVICH, J.

SUPREME COURT
FILED

SEP 21 1988

Laurence P. Gill, Clerk

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 1, No. B008880

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

HAFIF, et al., Respondents,

v.

ROSENTHAL, Appellant.

Appellant's petition for review DENIED.

BIRD

Chief Justice

APPENDIX B

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 19, 1986, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Law Offices of Herbert Hafif
269 West Bonita Avenue
Claremont, California 91711

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 19, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)

Supreme Court, U.S.
FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1018 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JEROME B. ROSENTHAL,
Petitioner,
v.
HERBERT HAFIF, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENTS

O'DONNELL and GORDON
PIERCE O'DONNELL
601 West Fifth Street, Suite 1200
Los Angeles, California 90017

(213) 688-1566

Attorneys for Respondents

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Attorneys for Respondents

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The Petition for Writ of Certiorari of Jerome B. Rosenthal raises no substantial, serious or important constitutional issues. It is simply the last possible delaying tactic available to petitioner to avoid payment of attorneys' fees for which he was and remains contractually liable. The arbitrators found the fees to be due, after Mr. Rosenthal stretched what should have been a four hour hearing into a one and one-half year engagement of attrition, and the California appellate courts have found no reason to overturn that result.

Respectfully submitted,

O'DONNELL and GORDON

BY: _____
PIERCE O'DONNELL
Counsel for Respondents

State of California

ss

County of Los Angeles

I, the undersigned, say: I am and was at all times mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 601 West Fifth Street, Suite 1200, Los Angeles, California 90017; that on January 19, 1987, I served the within Brief for Respondents in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543

Steiner & Gerstein
Robert S. Gerstein, Ph.D.
2566 Overland Avenue
Suite 700
Los Angeles, California 90064

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 19, 1987, at Los Angeles, California.

Celine Quarroz
(Original Signed)